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**IN THE  
SUPREME COURT OF THE UNITED STATES**

**October Term, 1978**

**No. 78-1564**

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**ROBERT A. BEAUMONT,**

**Petitioner,**

**-vs-**

**MICHIGAN DEPARTMENT OF LABOR and  
MICHIGAN CIVIL SERVICE COMMISSION,**

**Respondents.**

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**ON PETITION FOR A WRIT OF CERTIORARI  
TO THE SUPREME COURT OF THE  
STATE OF MICHIGAN**

**RESPONDENTS' BRIEF IN OPPOSITION**

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## TABLE OF CONTENTS

OPINIONS BELOW .....	1
JURISDICTION .....	2
QUESTIONS PRESENTED .....	3
STATUTORY PROVISIONS INVOLVED .....	3
STATEMENT OF THE CASE .....	3

### • ARGUMENT

This Case Merely Involves One Individual's Dissatisfaction With His Discharge From State Employment And Therefore Presents No Important Questions Which Must Be Decided By This Court Since The Decision Below Is Clearly Correct, Is Not In Conflict With Other Decisions Of This Court And The Record Reveals No Deprivation Of Constitutional Rights

A. The Allegations Of Violations Of State Statutory Rights Do Not Raise Issues Within This Court's Certiorari Jurisdiction Under 28 USC § 1257(3) And Are In Any Event Without Merit .....	5
B. Petitioner's Rights To Due Process And Equal Protection Of The Laws Were Not Violated In Any Of The Administrative Or Judicial Proceedings Below .....	9
CONCLUSION .....	12

## APPENDIX

## Page

1. Opinion and Decision of Hearing Officer Orland Ellis .....	1b
2. Opinion of the Honorable James T. Kallman, Circuit Judge .....	10b
3. MCLA 24.301-24.306; MSA 3.560(201)- 3.560(206) .....	17b
4. MCLA 32.271; MSA 4.1487(1) .....	20b
5. MCLA 35.351, 35.353; MSA 4.1486(1), 4.1486(3) .....	20b
6. MCLA 35.402; MSA 4.1222 .....	22b

## INDEX OF AUTHORITIES

CASES	Page
Beck v Washington, 369 US 541 (1962) .....	10
Bishop v Wood, 426 US 341 (1976) .....	11
Bowe v Scott, 233 US 658 (1914) .....	2
Groehn v Corporation and Securities Commission, 350 Mich 250; 86 NW2d 291 (1975) .....	6
Grubb v Public Utilities Comm'r of Ohio, 281 US 470 (1930) .....	10
Plec v Liquor Control Commission, 322 Mich 691, 34 NW2d 524 (1948) .....	6
Viculin v Department of Civil Service, 386 Mich 375, 393; 192 NW2d 449 (1971) .....	6
CONSTITUTION	
Mich Const 1908, art 6, § 22 .....	6
Mich Const 1963, art 4, § 48 .....	6
Mich Const 1963, art 11, § 5 .....	6, 8
STATUTES	
28 USC § 1257(3) .....	2, 5
MCLA 24.301-24.306; MSA 3.560(201)-3.560(206) ....	3, 4
MCLA 32.271; MSA 1487(1) .....	3, 4, 7
MCLA 35.351; MSA 4.1486(1) .....	3, 4
MCLA 35.353; MSA 4.1486(3) .....	3, 4, 7
MCLA 35.402; MSA 4.1222 .....	3, 4, 7

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OPINIONS BELOW

In addition to the orders and decisions set forth in petitioner's Appendix, Respondents believe that the court should have before it for consideration the following orders and opinions:

a. Opinion and decision of Hearing Officer Orland Ellis (Respondents' Appendix 1b).

b. Opinion of the Honorable James T. Kallman, Circuit Judge (Respondents' Appendix 10b).

## JURISDICTION

Respondents respectfully submit that this Court lacks jurisdiction to issue a writ of certiorari in this case. 28 USC § 1257(3) gives this Court jurisdiction to review final decisions of state courts by way of certiorari (1) where the validity of a federal treaty or statute is drawn in question; (2) where the validity of a state statute is drawn in question on the ground of its being repugnant to federal law; and (3) where a title, right, privilege, or immunity is set up or claimed under the constitution, treaties or statutes of, or commission held or authority exercised under, the United States. In the instant case, no challenge was placed to the validity of any federal treaty or statute; neither party contended that any state statute was invalid on the ground that it was repugnant to federal law; and no sufficient challenge or contention was made that any of the rights, privileges, or immunities of Petitioner under the constitution, treaties or statutes of the United States were violated, or in any event, the question has not been properly raised by the petition for certiorari filed in this cause. Petitioner's claim of a substantial federal question amounts to nothing more than the conclusory assertion that the state courts' interpretation of the applicability of certain state statutes deprived him of due process and equal protection. Such unsupported allegations, without more, are insufficient, *Bowe v Scott*, 233 US 658, 664-665 (1914), and merely involve questions of state law.

## QUESTIONS PRESENTED

1. ASSUMING, ARGUENDO, THAT A SUBSTANTIAL FEDERAL QUESTION IS INVOLVED, WAS PETITIONER DEPRIVED OF ANY MICHIGAN STATUTORY RIGHTS BY THE ADMINISTRATIVE AND JUDICIAL PROCEEDINGS RESULTING IN THE AFFIRMANCE OF HIS SEPARATION FROM STATE EMPLOYMENT?
2. WAS PETITIONER DEPRIVED OF DUE PROCESS OR EQUAL PROTECTION OF THE LAWS IN CONNECTION WITH THE ADMINISTRATIVE AND JUDICIAL PROCEEDING RESULTING IN THE AFFIRMANCE OF HIS SEPARATION FROM STATE EMPLOYMENT?

## STATUTORY PROVISIONS INVOLVED

Respondents submit that the following statutory provisions are involved in this case, the texts of which are included in Respondent's Appendix:

MCLA 32.271; MSA 1487(1): 20b

MCLA 35.351, 35.353; MSA 4.1486(1), 4.1486(3): 20b

MCLA 35.402; MSA 4.1222: 22b

MCLA 24.301-24.306; MSA 3.560(201)-3.560(206): 17b

## STATEMENT OF THE CASE

Petitioner was separated from employment with the Michigan Department of Labor, Bureau of Safety and Regulation, on November 20, 1972. Following his separation from employment, Petitioner, a member of the classified civil service,



pursued his grievance rights under the rules and regulations of the Michigan Civil Service Commission. His discharge by his appointing authority was sustained at all levels of the grievance hearings and appeals procedures culminating in an affirmance of said discharge by the Civil Service Commission. An appeal was taken from the Commission's decision to the Circuit Court for the County of Ingham pursuant to the provisions of the Michigan Administrative Procedures Act, MCLA 24.301-24.306; MSA 3.560(201)-3.560(206).

Under the provisions of the Michigan Administrative Procedures Act, *supra*, the reviewing court does not conduct a trial *de novo* but rather reviews the record made below and enters a decision either affirming, modifying or reversing that decision. The Circuit Court for the County of Ingham and the Michigan Court of Appeals affirmed the discharge of the petitioner. The Supreme Court of the State of Michigan denied Petitioner's application for leave to appeal.

On January 15, 1973, more than 30 days after the date on which Petitioner was discharged from employment, he first requested a hearing before the Governor of the State of Michigan. (Petitioner's Exhibit E). Petitioner similarly contended that he was entitled to a hearing before the Governor at hearings before a Civil Service hearing officer conducted on January 31, 1973, February 2, 1973, March 1, 1973 and March 2, 1973. He further placed in issue at said hearings, the question of the applicability of MCLA 32.271; MSA 1487(1), MCLA 35.351; MSA 4.1486(1), MCLA 35.353; MSA 4.1486(3), MCLA 35.353; MSA 4.1486(3) and MCLA 35.402; MSA 4.1222 with reference to his discharge from State service. The hearing officer ruled that these statutes were not applicable. Further, the hearing officer found that the reason for the petitioner's discharge was not discrimination because of military service. Respondent's App 6b.

## ARGUMENT

**THIS CASE MERELY INVOLVES ONE INDIVIDUAL'S DISSATISFACTION WITH HIS DISCHARGE FROM STATE EMPLOYMENT AND THEREFORE PRESENTS NO IMPORTANT QUESTIONS WHICH MUST BE DECIDED BY THIS COURT SINCE THE DECISION BELOW IS CLEARLY CORRECT, IS NOT IN CONFLICT WITH OTHER DECISIONS OF THIS COURT AND THE RECORD REVEALS NO DEPRIVATION OF CONSTITUTIONAL RIGHTS.**

**A. The Allegations Of Violations Of State Statutory Rights Do Not Raise Issues Within This Court's Certiorari Jurisdiction Under 28 USC § 1257(3) And Are In Any Event Without Merit.**

As noted in the "Jurisdiction" section of this brief, *supra*, Respondents submit that Petitioner's argument that his rights under Michigan statutes were violated does not raise any issue within this Court's certiorari jurisdiction under 28 USC § 1257(3). Even if such an issue is within this Court's jurisdiction, however, Petitioner's contentions are without merit because it is clear that the Michigan courts considered his contentions and properly rejected them, concluding that he was not entitled to a hearing before the governor and that the discharge from state employment did not violate any other state statutory rights.

Petitioner alleges violation of his rights under certain Michigan statutes but that contention is without merit since the Michigan constitutional provisions relating to the state civil service take precedence over such statutes and it is not alleged that state civil service procedures were violated in connection with Petitioner's separation from state employment. Michi-

gan Const 1963, art 11, § 5 gives the Civil Service Commission the power to:

“... [C]lassify all positions in the *classified service* ... determine by competitive examination and performance exclusively on the basis of merit, efficiency and fitness the qualifications of all candidates for positions in the classified service, *make rules and regulations covering all personnel transactions. . . in the classified service.*” (emphasis added)

This provision of the Michigan Constitution provides for a Civil Service Commission with power to determine the procedure for the hiring, employment, and discipline of employees of the classified civil service. In referring to the scope of the Commission's authority, the Michigan Supreme Court has said:

“The Civil Service Commission is a constitutional body possessing plenary power. . . .” *Viculin v Department of Civil Service*, 386 Mich 375, 393; 192 NW2d 449 (1971)

See also *Groehn v Corporation and Securities Commission*, 350 Mich 250; 86 NW2d 291 (1975) and *Plec v Liquor Control Commission*, 322 Mich 691; 34 NW2d 524 (1948), which, while decided prior to the adoption of Mich Const 1963, interpreted the similar provision of Mich Const 1908, art 6 § 22.

The Michigan Constitution further provides in art 4, § 48 that:

“The legislature may enact laws providing for the resolution of disputes concerning public employees, *except those in the state classified civil service.*” (emphasis added)

As a result of these provisions, control over members of the classified civil service such as petitioner, was preempted by the Civil Service Commission.

Petitioner contends that he is entitled to a hearing before the Governor by virtue of the provisions of MCLA 35.402; MSA 4.1222. Assuming, *arguendo*, that a veteran who is discharged from a classified civil service position is entitled to such a hearing, Petitioner waived any such right by failing to file a written protest within 30 days from the date of his removal from state service, MCLA 35.402; MSA 4.1222. Petitioner was discharged on November 20, 1972; he first filed a written protest or request for a hearing before the Governor on January 15, 1973 (Petitioner's Exhibit E) and thus and an adequate independant State law basis exists for the decision below, precluding review by this Court.

MCLA 32.271, *supra*, simply provides that no person shall be discriminated against because of his membership in the military or naval forces of the State or the United States. Because Petitioner's discharge was for failure to inform his supervisor of his absence from work and not for the absence itself, it cannot seriously be contended that Petitioner was discriminated against because of his membership in the military. It is conceded that under the provisions of MCLA 35.351 *et seq*, *supra*, any public employee shall be granted a leave of absence for the purpose of being inducted or otherwise entering military duty. In the instant case, Petitioner made no request for any such leave, but instead, absented himself from his employment station without advising his appointing authority.

With regard to Petitioner's allegation that he was entitled to be restored to his position upon return from military service and could not thereafter be discharged from such position within one year after such restoration, it is to be noted that MCLA 35.353, *supra*, read in proper context, provides that a veteran who is restored to his position in public employment shall not be discharged from such position *without cause* within one year after such restoration period. Petitioner was separated

for cause as set forth in the decision of the hearing officer (Respondents' Appendix 2b).

Petitioner has alleged that the Civil Service Commission, the Circuit Court for the County of Ingham, the Michigan Court of Appeals and the Supreme Court of the State of Michigan failed to address the questions raised by the petitioner with reference to the statutes of the State of Michigan. This contention proceeds from either a lack of understanding of, or a refusal to consider, the applicable civil service rules and regulations and Michigan statutes governing administrative hearings, decisions and appeals.

In the grievance procedures established by the Civil Service Commission pursuant to the authority of Mich Const 1963, art 11, § 5, *supra*, the "trial" of any grievance is conducted before a hearing officer of the Civil Service Commission. At any such hearing the parties are afforded an opportunity to present testimony, introduce exhibits and advance arguments in support of their position. Appeals from decisions of Civil Service hearing officers are taken to the Civil Service Commission itself where the record below is reviewed and, at the discretion of the Commission, additional hearings may be conducted. Appeals from decisions of the Civil Service Commission are taken to the Circuit Courts under the provision of the Michigan Administrative Procedures Act, *supra*. The review provided for by said Act on appeal from a decision of the Civil Service Commission is in the nature of certiorari. Further appeals within the court system are governed by the statutes and court rules with reference to appeals generally.

From the above, it can be seen that since appeals to the courts from decisions of the Civil Service Commission do not entitle appellants to a trial *do novo*, the reviewing court must and does review the whole record made below and

bases its decision upon a consideration of the *whole* record. It is therefore respectfully submitted that, in the instant case, the reviewing courts considered all of the evidence and arguments presented at the hearings before the Civil Service hearing officer in arriving at their decisions. The contention that they did not is without merit.

**B. Petitioner's Rights To Due Process And Equal Protection Of The Laws Were Not Violated In Any Of The Administrative Or Judicial Proceedings Below.**

Although Respondents submit that any federal question as to alleged due process and equal protection violation was not sufficiently raised below, see "Jurisdiction" section, *supra*, even if such a question is properly presented here it is without merit. Petitioner argues that his right to due process and equal protection of the laws was somehow violated, not by the named Respondents herein, but by the state courts which, he alleges (Petition, p 10), refused to address his contention that he was entitled to certain rights under Michigan statutes. Assuming, *arguendo*, that Petitioner sufficiently raised the federal question in the administrative and judicial proceedings below, the fact that his separation from state employment was affirmed necessarily means that his contentions were conclusively rejected:

"In the opinion of the state court there is no express mention of the constitutional grounds upon which the appellant asked a reversal of the order . . . and from this it is argued that the constitutional validity of the order was not determined, and therefore as to that matter the judgment is not *res judicata*. But the argument is not sound. The question of the constitutional validity of the order was distinctly presented by the appellant's position and necessarily was resolved against him by the judgment affirming the order. Omitting to mention



that question in the order did not eliminate it from the case or make the judgment of affirmance any the less an adjudication of it." *Grubb v Public Utilities Commission of Ohio*, 281 US 470, 477-478 (1930).

Petitioner's constitutional claims amount to nothing more than the self-serving assertion that certain state statutes apply to him. By rejecting his claims the administrative and judicial tribunals below interpreted the statutes differently and simply concluded that they were inapplicable to him. Petitioner was given a full and fair hearing and afforded every opportunity to present his case. As may occur during the course of any litigation, rulings were made which were adverse to the Petitioner's contentions but he seemingly fails to recognize that such adverse rulings with respect to the legal contentions advanced on his behalf did not constitute a denial of due process. Even if the rulings were erroneous, a judicial officer's failure to rule correctly with respect to an issue of law is not a denial of due process. See *Beck v Washington*, 369 US 541, 554-555 (1962).

Similarly, Petitioner's contention that he was denied equal protection of the laws is without merit. There has been absolutely no showing on the record that Petitioner was treated differently than any other state employee similarly situated. His claim, in effect, is not that the veteran's preference statutes of the state of Michigan were applied differently in his case from the manner in which they were applied to others, but that these statutes were erroneously applied by the administrative tribunals and the courts. It cannot be seriously contended that a court's interpretation and application of a statute in a manner contrary to that requested by a litigant constitutes a denial of the equal protection of the laws. In *Beck v Washington*, *supra*, 369 US at 554-555 the court rejected an equal protection challenge in which the Petitioner alleged that the state had singled him out for special treat-

ment by denying him procedural safeguards allegedly afforded to others:

"And even if we were to assume that Washington law requires such procedural safeguards, the petitioner's argument here comes down to a contention that Washington law was misapplied. Such misapplication cannot be shown to be an invidious discrimination. We have said time and again that the Fourteenth Amendment does not 'assure uniformity of judicial decisions . . . [or] immunity from judicial error . . .' *Milwaukee Electric R. and Light Co v Wisconsin*, 252 US 100, 106, 64 L Ed 476, 480, 40 S Ct 306, 10 ALR 892 (1920). Were it otherwise, every alleged misapplication of state law would constitute a federal constitutional question."

In *Bishop v Wood*, 426 US 341, 344-345 (1976) this court reiterated the principle that sufficiency of a claim of entitlement to a property interest in employment can only be decided by reference to state law. In the instant case Petitioner Beaumont has not alleged a due process right to any particular procedure, and such a claim would be meritless in light of the dispositive state court opinions rejecting the state statutory interpretation he espouses. This court's language in *Bishop v Wood*, *supra*, 426 US at 349-350 is applicable in the instant case:

"The federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies. We must accept the harsh fact that numerous individual mistakes are inevitable in the day-to-day administration of our affairs. The United States Constitution cannot feasibly be construed to require federal judicial review for every such error. \* \* \* The due process clause of the Fourteenth

Amendment is not a guarantee against incorrect or ill-advised personnel decisions." (Footnote omitted).

### CONCLUSION

For the foregoing reasons it is requested that the petition for a writ of certiorari be denied.

Respectfully submitted,  
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Dated: May 11, 1979

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### APPENDIX

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STATE OF MICHIGAN

(SEAL)

WILLIAM G. MILLIKEN, Governor  
DEPARTMENT OF CIVIL SERVICE

Lewis Cass Building, Lansing, Michigan 48913  
SIDNEY SINGER, State Personnel Director

Civil Service  
Commission  
David Pollack  
Chairman  
Ernest L. Brown  
Ruth M. Robertson  
Walter D. DeVries

APR 6, 1973

AN ADJUDICATION IN  
THE MATTER  
of  
ROBERT BEAUMONT  
and  
DEPARTMENT OF LABOR

HB 25-73  
G - Compensation  
4 - Policy  
Application  
A - Discipline  
11 - Misconduct

**PRESENT**

Hearing Officer:  
Mr. Orland Ellis  
Hearings Reporters:  
Mrs. Hazel Bucher  
Mrs. Linda Lundquist

**APPEARANCES**

Mr. Robert Beaumont, Appellant  
 Mr. Fred Lapinski, Director, Employee Relations, M.S.E.A.  
 Mr. Archie C. Fraser, Attorney, Representing M.S.E.A.  
 Mr. Clair Andrews, Witness  
 Mr. William Gutos, Witness

**Department of Labor**

Mr. Barry Brown, Director  
 Mr. Arthur Zink, Personnel Officer

**Department of Civil Service**

Mr. Jon McNeil, Personnel Officer

Hearings were held on January 31, 1973 in the Department of Civil Service Conference Room, on February 2, 1973 in the Department of Administration Conference Room and on March 1 and 2, 1973, in the Department of Administration Conference Room, in the Lewis Cass Building at 320 South Walnut Street, Lansing, Michigan.

MEMBER—Public Personnel Association

MICHIGAN The Great Lake State

**First Grievance**

This is an appeal by Mr. Robert Beaumont from the Department of Labor's refusal to pay military leave for his absence from October 30, 1972 through November 3, 1972.

According to the orders issued by the Department of the Army dated October 19, 1972, (Appellant's Exhibit No. 23 of

March 1, 1973), Mr. Beaumont was ordered to "active duty for training—less than 90 days for retirement points only". He was further ordered "to attend the NRA approved safety/training session sponsored by the National Safety Council. No pay, allowances or travel at government expense authorized."

It is Mr. Beaumont's contention that under the terms of the order that he was entitled, in accordance with the rules of the Civil Service Commission, Section 11.4, to an equivalent to the difference between the employee's military pay and his regular state salary for each day of absence from scheduled state employment. He likewise claims that denying him the pay differential is a violation of the Michigan Constitution and the Acts of the State of Michigan relating to the rights of members of the armed forces, being the 1963 Constitution of the State of Michigan; Act 205 of the Public Acts of 1897, as amended by Act 179 of the Public Acts of 1959; Michigan Statutes Annotated 4.1487(1) and Michigan Statutes Annotated 4.1486(1).

The Hearing Officer finds no violation of the rights granted the employee under the Constitution of the Laws of the State of Michigan or of the United States. It was not established by the evidence that the employee was discriminated against because of his service nor was he hindered or prevented from performing military service.

The remaining issue, then, in this matter, is whether under Rule 11.4 Mr. Beaumont was on "a temporary leave of absence for active duty training". It appears from the testimony to be without question that the Civil Service Commission in the past had treated these situations as not entitling the employee to the pay differential. (See "Changing Forms" dated June 29, 1964, Civil Service Commission Exhibit No. 1 of January 31, 1973.) Indeed, Mr. Beaumont testified that he had served several times without military pay and had not asked for state pay.



It is the opinion of the Hearing Officer that the best principle to determine the meaning of a rule is to use that construction which the parties have already placed on the language involved. The Civil Service Commission did not in the past regard military leave of this type as entitling the employee to the state pay differential and the employee himself concurred.

It is the opinion of the Hearing Officer that when an employee serves in the military without pay he is precluded from asking for pay from the State.

Mr. Beaumont's request for military leave pay is therefore denied.

### **Second Grievance**

This grievance is an appeal from the dismissal of Mr. Robert Beaumont by the Department of labor on November 20, 1972 from his position as Labor Safety Supervisor 13. The grounds for his dismissal are contained in the rules of the Civil Service Commission, Section 32.1 A and 32.1 C.

The Hearing Officer conducted hearings on the matter of this separation (and related matters of military leave pay and adjournments) over a period of four (4) different days. In this matter there was a great deal of testimony offered and a total of 74 exhibits introduced by the Appellant. He testified in his own behalf for a period of one (1) day.

In a general way, there is little dispute between the Department of Labor and Mr. Beaumont in relation to what was done. The dispute arises from whether or not the employee is invading managerial functions, whether he is presenting valid opinion, whether he is operating to the detriment of the employer, failing to carry out his duties and obligations and failing to perform his functions.

Mr. Beaumont was dismissed by the Department of Labor for the reasons stated in the memorandum from the Director of the Board of Safety and Regulations to the Director of the Michigan Department of Labor dated November 20, 1972. The specifics of the employer's complaint was that while Mr. Beaumont was on military leave from October 24, 1972 through November 17, 1972 he failed to notify his supervisor that he would be on military leave for that period of time. It was also charged that he:

- a. Failed to make arrangements with his supervisor to have his position covered and make arrangements for the supervision of his personnel.
- b. Attended the meeting of the National Safety Congress in Chicago and failed to notify his supervisor of his whereabouts.
- c. Failed to carry out the rating procedure that his supervisor had set up for new employees.
- d. That the employee was critical of his supervisor and communicated this criticism to his personnel to the detriment of the morale and effectiveness of the Board of Safety and Regulations.

Mr. Beaumont, on the other hand, alleges that he followed past procedures in giving notice of his military leave, that he followed the rules in reference to informing the Bureau of Safety Regulations as to his dates of military leave and to his itinerary. Mr. Beaumont also takes the position that his criticism of any of the activities of his supervisor or of the Board were in the nature of legitimate critique and not detrimental to the good order of his employer's affairs. The employee further charges that any lack of communications between himself and his supervisor was the supervisor's fault

and not his, that the basis of his discharge was discrimination because of his military service prohibited by law, that the charges of his employer do not satisfy the requirements of the Civil Service Commission for separation and that he was not given proper counselling prior to his termination.

The testimony satisfies the Hearing Officer that there was no violation of the Constitution or of the Laws of the State of Michigan or of the Federal statutes in reference to the separation. The Hearing Officer finds that the reason for the separation was not discrimination because of military service.

A substantial portion of the testimony produced by Mr. Beaumont relates to the quantitative analysis of the Safety Services East and Safety Services West which was used by the department in its considerations. The testimony leaves the Hearing Officer with no other conclusion other than that the Bureau of Safety and Regulations is not engaged in any "numbers games" but that a quantitative analysis is only one of the tools used by management. The Hearing Officer finds that it was used only as one of the tools and was not sole and exclusive reason for the separation of the employee. The contention that the quantitative analysis is destructive of the professional aspect of the position is not well taken. Professional people of all types are subject to time limits. The attorney must have his pleadings in court by a certain day. He must be ready for trial by a certain day. The accountant is confronted with deadlines of all kinds in connection with the preparation of income tax and related returns to both the Michigan and the United States Government. From the testimony it is clear that the quantitative analysis was not directed against Mr. Beaumont exclusively but that it was used by the Bureau in connection with other employee problems also.

There is a dispute as to what the employee did in reference to notifying the Bureau of his dates of absence for military leave and his itinerary. It is undisputed, however, that his employer was not notified until the Friday immediately preceding the week which he was to be absent in at least the first week of his military service and that he did not supply his itinerary before that date. A similar pattern ensued as to the remaining three (3) weeks of his service. It is true that the employer does not have the right to approve or disapprove military leave. Nevertheless, the employer should be notified.

It is undisputed that Mr. Beaumont failed to communicate directly with his supervisor in regard to these leaves and the Hearing Officer is satisfied that during this absence Mr. Beaumont failed to make proper provisions for the supervision of the unit. To this extent, he failed in his duties.

The contention by the employee that because of the nature of the work, the employees have continuing assignments, that they are self-starters and that they do not need supervision is not convincing.

The Hearing Officer finds that as a matter of fact that Mr. Beaumont discussed with subordinate field employees departmental problems and also that he criticized his supervisor to these field employees. This conduct is contrary, not only to departmental policy, but to good standards of conduct in public or private employment.

During the course of the hearing, Mr. Beaumont introduced a number of letters furnished to him by his field employees which, in effect, said they could not comply with the rating standards promulgated by Mr. Orsborn. These exhibits, in my opinion, were a refutation of what Mr. Beaumont stated orally. No other conclusion can be drawn from the letters other than Mr. Beaumont had solicited them from the field employees

and encouraged the criticisms. This in and of itself is unsatisfactory conduct.

In reference to the lack of communication which was charged to Mr. Beaumont's supervisor, I gather from the testimony that there has been a long-standing lack of communications, rapport or good will, whatever you wish to term it, between Mr. Orsborn and Mr. Beaumont. Mr. Fiordellis has talked with both of the parties about this matter and had stated that he wanted this type of conduct terminated. At least, to that extent, Mr. Beaumont was counselled in the matter. In this particular case, I find that lack of communications was something that was attributable to Mr. Beaumont and not to his supervisor.

Mr. Beaumont was further counselled in connection with potential promotion reports (See Department's Exhibits #10, 11 and 12). I, therefore, find that Mr. Beaumont's contention is without merit.

A letter from the Department of the Army dated February 26, 1973, with enclosures, was dispatched to the Hearing Officer on Wednesday, March 7, 1973, but was not received until Monday, March 10, 1973. However, I am of the opinion that the letter and enclosures should be admitted as an exhibit and it is so admitted.

Likewise, the Hearing Officer has carefully studied the Supplementary Brief of the Appellant dated March 22, 1973, and is admitting it into the record.

There is a discrepancy between the two (2) sets of orders attached to LTC Prescott's letter. One conforms to the copy submitted as Department's Exhibit 5. The other has a sentence added in Paragraph (c), "To attend the NRA approved marksmanship safety/training sessions sponsored by the National Safety Council."

Mr. Beaumont discusses this in Paragraph 10 of his Supplemental Brief. However, the argument is not convincing to the Hearing Officer. I wish to assure Mr. Beaumont that I have taken note of the phrasing in LTC Prescott's letter that there is "nothing at hand" to indicate Mr. Beaumont was involved in any significant duties of a classified nature. Also, I do not consider the Department's letter of March 7, 1973 to me as evidentiary in nature. I, too, do not find the summary of orders as germane.

From examination of the alteration of the orders, I conclude that there is no valid basis for the deletion of part of the order. From the testimony, I conclude that it was done for the purpose of keeping his employer from knowing his itinerary.

During the progress of the hearing, Mr. Beaumont offered to take a lie-detector test. Courts of law do not admit polygraphs tests as evidence for two (2) reasons. The first is that it has never been satisfactorily demonstrated that the test is accurate. Second, it invades the prerogative of the trier of the facts. For these reasons, Mr. Beaumont's offer is rejected.

### **Decision**

Based upon the preceding discussion and findings, I conclude that Mr. Beaumont's appeal is without merit and is dismissed. The Department of Labor was justified in terminating his employment under the laws of this State and the rules of the Civil Service Commission.



STATE OF MICHIGAN  
IN THE CIRCUIT COURT FOR THE  
COUNTY OF INGHAM

---

ROBERT A. BEAUMONT,  
Plaintiff,

-vs-

MICHIGAN DEPARTMENT OF  
LABOR and MICHIGAN CIVIL  
SERVICE COMMISSION,  
Defendants.

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**OPINION**

No. 73-16070-AV

Oral arguments in Plaintiff's appeal were heard on July 8, 1976. The Court having heard the arguments of counsel, read the briefs, reviewed the record, and further being fully advised in the premises makes the following determinations:

**FACTS**

This is an appeal from the Civil Service Commission which upheld a decision of the Department of Labor dismissing the Plaintiff as an employee of that Department. On November 20, 1972, the Plaintiff's employment as a Labor Safety Supervisor 13 was terminated. Subsequently a hearing on the matter was held by the Department of Civil Service. After the conclusion of that hearing and after a consideration of the record the Hearing Officer opined that the Plaintiff's appeal was without merit and that the Department was justified in terminating his employment. Among the reasons given for upholding the decision of the Department of Labor were: that the separation was not because of military service; that the quantitative analysis of the performance of the east-west sectors was one reason but not the exclusive reason for the Plain-

tiff's dismissal; that the Plaintiff failed to notify his supervisors prior to his leaving for military duty; that he failed to provide for the supervision of his unit during his absence; that he discussed departmental problems and criticized his supervisor in the presence of field employees; that the communications problem with supervisors was attributable to the Plaintiff and that he was counselled in connection with potential promotion reports; and finally that certain portions of the Plaintiff's military orders were deliberately deleted for the purpose of keeping his employer from knowing his itinerary.

This matter found its way to this Court in the form of an appeal. On March 11, 1975, the case was remanded to the Civil Service Commission for the purpose of amplification of the record. A hearing was conducted and decision issued in which it was held that the opinion of then Judge Reisig on the freedom of speech issue was not directly relevant or material to this case; that information pertaining to the Plaintiff's unemployment compensation hearing was immaterial and irrelevant to this case; and that the exoneration of the Plaintiff by the Army was not relevant or material to this case.

The matter is now ready for determination by this Court. It should be emphasized that review is limited to the record below. It must be determined whether the decision below is supported by the record. Section 106 of the Administrative Procedures Act provides that the decision or order of any agency shall be set aside only if it (a) violates the constitution or a statute (b) is in excess of the statutory authority or jurisdiction of the agency, (c) was made upon unlawful procedure, (d) is not supported by competent, material and substantial evidence on the whole record, (e) represents an arbitrary abuse of discretion, or (f) is erroneous as a matter of law. Whether the Court might have reached a different decision if it had heard the case originally is immaterial.



## ISSUE

Whether the findings of the Hearing Officer are supported by the record?

## DISCUSSION AND FINDINGS

The Plaintiff averred in written and oral argument that his dismissal was because of his military service. There is nothing in the record to support such an assertion. In fact the Defendants agree that a public employee has the right to participate in military service when called upon by the Federal government to do so without the prior approval of a supervisor. The Plaintiff's problems and dismissal were a result of the manner in which he gave notice (or lack of it) in connection with leaving for military service. Dismissal was not the result of the Plaintiff's military service per se. The decision of the Hearing Officer that separation was not because of military service is supported by the record.

The finding that Plaintiff failed to notify his superior of impending military duty is closely related to the communications problem the two individuals were having. The Plaintiff submitted standard forms to the payroll department prior to leaving for military duty. He also submitted itineraries for the period that he would be absent. However there was no direct communication to his supervisor Mr. Orsborn. This was shortly after a direct order from Mr. Fiordellis that he wanted communications between the two men (TR 195). The Plaintiff was absent for four weeks yet he asserts that he had no knowledge that his absence would be that long because his orders came in from week to week. It is interesting that the Plaintiff would inform his secretary of the *possibility* that he would be gone for about a month (TR 96, 320) yet he failed to mention anything to his supervisor. In fact his secretary

was informed not to tell anyone of his whereabouts unless directly asked.

The fact that the Plaintiff failed to notify his supervisor after a direct order from above, and that he had knowledge of the possibility that he would be gone for a long period of time negates the fact that past procedure was complied with. In fact Plaintiff on previous occasions had given notice regarding military leave (TR 111). It is apparent that the finding that Plaintiff failed to give notice prior to military leave is supported by the record.

The communications problem is closely related to the finding that the Plaintiff failed to provide for the supervision of his unit during his absence. Once again Plaintiff had been under a direct order to communicate. The Plaintiff's argument is that the men in his unit were self-starters who needed a minimum of supervision and that if any problems did come up they could be handled by his supervisor Mr. Orsborn. When Orsborn checked with the Plaintiff's fieldmen he was told that they had no instructions and didn't know where the Plaintiff had gone. In light of the fact that the Plaintiff knew that he would possibly be gone for a long period of time some arrangement should have been made. The finding that Plaintiff failed to provide for supervision in his absence is supported by the record.

The record reflects that the Plaintiff discussed and cut down individuals in the department and undermined the department. The Plaintiff informed Mr. Luck, a trainee, to disregard rating factors set forth by Mr. Orsborn (TR 135). It appears that Plaintiff was obsessed with the abilities and performance of Mr. Orsborn and discussed this with a Mr. Cooper, an employee within the department (TR 157-158). A Mr. Schreiber testified that the Plaintiff was constantly downgrading Mr. Orsborn (TR 163) and that he was out to

get Orsborn (TR 166). It is obvious that the Plaintiff discussed and criticized his supervisor and his policies in the presence of other employees in the department.

It should be noted here that the Hearing Officer on remand from this Court found that the freedom of speech issue heard by Judge Reisig was not material to the issue of dismissal. That finding is supported by the record. The freedom of speech issue dealt with a directive of the Department of Labor that Mr. Beaumont cease and desist from holding press conferences and discussing policy matters with governmental representatives. The decision by Judge Reisig which was favorable to the Plaintiff did not deal with discussion and criticism of superiors with department employees. There is nothing in the record to indicate that the freedom of speech issue played any part in the Plaintiff's dismissal.

The Hearing Officer found that the quantitative analysis of the east-west sectors comparing the performance of the Plaintiff's men with that of the men in the east sector was only *one* reason for the Plaintiff's dismissal. The Plaintiff complains that the study was prejudicial because he had no input into the analysis, the geographic regions were disparate in size, and that a one month period which would have been favorable to his position was not included in the study. Mr. Lee Weber was assigned to work on the comparison study. He testified that the Plaintiff was not consulted because, "numbers are numbers" and department records were relied on for the study (TR 256). He emphasized that his assignment was to compare quantity not quality (TR 258). When Mr. Weber was recalled to the stand he testified that if the performance for the month of April, 1972, had not been included in the study (Plaintiff complains of the absence of this month in the comparison) there would have been only a 2% increase in the performance of the west sector.

The complaint of the disparity in geographical size is not really valid. Although the Plaintiff's men had to cover more territory in their work the men in the highly industrialized east sector had more companies to deal with. It is obvious that the geographical area in the west was balanced against the industrial concentration in the east to make the work loads as equal as possible.

The Hearing Officer recognized the fact that the study was only quantitative. However, the issues previously discussed (lack of notice, failure to provide for supervision, the communication problem, and the criticism of supervision) support the finding that the comparison study was not the sole reason for the Plaintiff's dismissal.

The findings of the MESC concerning the Plaintiff's unemployment compensation are not relevant because misconduct which would justify dismissal is not necessarily the same that would justify the denial of unemployment benefits. Also the exoneration of the Plaintiff by the Army is not relevant to the issues here because the inquiry the Army dealt with alleged violations of Army regulations and not with misconduct in state employment.

The Court takes issue with the finding of the original Hearing Officer that promotional ratings are a form of counseling and thus the Plaintiff had been counseled as to his shortcomings. There is nothing in the record of the original hearing to indicate that promotional ratings are a form of counseling. At the remand hearing, Mr. Riggs, the Director of the Evaluation Division in the Department of Civil Service, testified that there is not automatic tie-in between Promotional Potential Ratings and counseling (TR 28).

At the remand hearing Mr. John Fitch from the Bureau of Labor Relations, Department of Civil Service testified that

in public employment counseling is recognized as one step in progressive discipline. It takes two forms: verbal and written (TR 23). However, he testified that he had no knowledge of the procedure followed in the Department of Labor (TR 24). He was certain that all departments have a counseling procedure of one type or another (TR 25). The Plaintiff complains that he had no counseling which would have made him aware of his deficiencies. Unfortunately the Defendants have not adequately addressed this question. However, it appears from the record that the Plaintiff's dismissal was because of insubordination and lack of communication with his supervisor. In this regard in September of 1972 the Plaintiff, Mr. Orsborn and their superior Mr. Fiordellis met to discuss the problem. As a result of that meeting Mr. Fiordellis directed that the two men communicate (TR 195). Without more it would appear that the Plaintiff was counseled with regard to the communications problems on this occasion. Yet, as noted earlier, a few weeks later the Plaintiff left for military duty without notifying his superior.

### DECISION

The record reflects a pattern of insubordination by the Plaintiff, contempt for his supervisor, and at times indifference to his job. The record supports the finding of the Hearing Officer. The decision appealed from is affirmed.

An Order may enter in conformity with this Opinion.

/s/ JAMES T. KALLMAN  
James T. Kallman, Circuit Judge

September 8, 1976

MCLA 24.301; MSA 3.560(201): When a person has exhausted all administrative remedies available within an agency, and is aggrieved by a final decision or order in a contested case, whether such decision or order is affirmative or negative in form, the decision or order is subject to direct review, by the courts as provided by law. Exhaustion of administrative remedies does not require the filing of a motion or application for rehearing or reconsideration unless the agency rules require the filing before judicial review is sought. A preliminary, procedural or intermediate agency action or ruling is not immediately reviewable, except that the court may grant leave for review of such action if review of the agency's final decision or order would not provide an adequate remedy.

MCLA 24.302; MSA 3.560(202): Judicial review of a final decision or order in a contested case shall be by any applicable special statutory review proceeding in any court specified by statute and in accordance with the general court rules. In the absence or inadequacy thereof, judicial review shall be by a petition for review in accordance with sections 103 to 105.

MCLA 24.303; MSA 3.560(203): (1) A petition for review shall be filed in the circuit court of the county where petitioner resides or has his principal place of business in this state, or in the circuit court for Ingham county.

(2) A petition for review shall contain a concise statement of:

(a) The nature of the proceedings as to which review is sought.

(b) The facts on which venue is based.

(c) The grounds on which relief is sought.



(d) The relief sought.

(3) The petitioner shall attach to the petition, as an exhibit, a copy of the agency decision or order of which review is sought.

MCLA 24.304; MSA 3.560(204): (1) A petition shall be filed in the court within 60 days after the date of mailing notice of the final decision or order of the agency, or if a rehearing before the agency is timely requested, within 60 days after delivery or mailing notice of the decision or order thereon. The filing of the petition does not stay enforcement of the agency action but the agency may grant, or the court may order, a stay upon appropriate terms.

(2) Within 60 days after service of the petition, or within such further time as the court allows, the agency shall transmit to the court the original or certified copy of the entire record of the proceedings, unless parties to the proceedings for judicial review stipulate that the record be shortened. A party unreasonably refusing to so stipulate may be taxed by the court for the additional costs. The court may permit subsequent corrections to the record.

(3) The review shall be conducted by the court within a jury and shall be confined to the record. In a case of alleged irregularity in procedure before the agency, not shown in the record, proof thereof may be taken by the court. The court, on request, shall hear oral arguments and receive written briefs.

MCLA 24.305; MSA 3.560(205): If timely application is made to the court for leave to present additional evidence, and it is shown to the satisfaction of the court that an inadequate record was made at the hearing before the agency or that the additional evidence is material, and that there

were good reasons for failing to record or present it in the proceeding before the agency, the court shall order the taking of additional evidence before the agency on such conditions as the court deems proper. The agency may modify its findings, decision or order because of the additional evidence and shall file with the court the additional evidence and any new findings, decision or order, which shall become part of the record.

MCLA 24.306; MSA 3.560(206): (1) Except when a statute or the constitution provides for a different scope of review, the court shall hold unlawful and set aside a decision or order of an agency if substantial rights of the petitioner have been prejudiced because the decision or order is any of the following:

- (a) In violation of the constitution or a statute.
- (b) In excess of the statutory authority or jurisdiction of the agency.
- (c) Made upon unlawful procedure resulting in material prejudice to a party.
- (d) Not supported by competent, material and substantial evidence on the whole record.
- (e) Arbitrary, capricious or clearly an abuse or unwarranted exercise of discretion.
- (f) Affected by other substantial and material error of law.

(2) The court, as appropriate, may affirm, reverse or modify the decision or order or remand the case for further proceedings.



MCLA 32.271; MSA 4.1487(1): No person shall discriminate against any officer or enlisted man of the military or naval forces of the state or of the United States because of his membership therein.

MCLA 35.351; MSA 4.1486(1): When used in this act—

(a) The term "public employee" means any person holding a position in public employment, both classified and unclassified.

(b) The term "public employment" means remunerative employment by the government of this state, or of any county, municipality, or other civil or political subdivision thereof, including any department, agency or instrumentality thereof.

(c) The term "public employer" means any government, department or agency mentioned in subsection (b) of this section employing a public employee in a position.

(d) The term "position" means employment, whether probationary or otherwise, held by a public employee at the time of entrance into military duty, but shall not include temporary or casual employment or an office filled by election, nor officers appointed for a fixed term.

(f) The term "military duty" means (1) training and service performed by an inductee, enlistee or reservist or any entrant into a temporary component of the armed forces of the United States, and (2) time spent in reporting for and returning from training and service, or if a rejection occurs, from the place of reporting therefor: Provided, That the time spent does not exceed the minimum time required by law for the inductee or not exceed 3 years for the first enlistment, or not exceed 3 years for the reservist after being recalled to active duty or as soon after the expiration of such 3 years as the

reservist is able to obtain orders relieving him from active duty: And provided further, That if the re-employment provision of the selective service act is amended to provide a period of other than 3 years, such a period provided by the selective service act shall apply.

MCLA 35.353; MSA 4.1486(3): Any person who is restored to a position in accordance with the provisions of this act shall not be discharged from such position without cause within 1 year after such restoration, unless all employees in the same classification with less seniority are first laid off and shall, without limiting other rights conferred by this or other sections, be considered as having been on furlough or leave of absence during his period of military duty. He shall be restored without loss of seniority, including, upon promotion or other advancement following completion of any period of employment required therefor, a seniority date in the advanced position which will place him ahead of all persons previously junior to him who advanced to the position during his absence in the armed forces. He shall also be entitled on reinstatement to participate in insurance (including pension plans and medical insurance) and other benefits dependent on length of employment to the same extent as if he had remained continuously at work; he shall have the option to continue during his term of military service payments which participation in the benefit would have required of him had he remained at work, and shall have the option upon reinstatement to make up and such contributions which were not made during the period of his military duty; the employer shall make on the employee's behalf any payments the employer would have made had the employee remained at work. He shall be protected against reduction in his seniority, status or pay during his employment except as such reduction may be made for all employees whose employment situations are similar.

Nothing in this section shall be construed as requiring the granting of more than a total of 6 years' credit towards retirement.

MCLA 35.402; MSA 4.1222: No veteran or other soldier, sailor, marine, nurse or member of women's auxiliaries as indicated in the preceding section holding an office or employment in any public department or public works of the state or any county, city or township or village of the state, except heads of departments, members of commissions, and boards and heads of institutions appointed by the governor and officers appointed directly by the mayor of a city under the provisions of a charter, and first deputies of such heads of departments, heads of institutions and officers, shall be removed or suspended, or shall, without his consent, be transferred from such office or employment except for official misconduct, habitual, serious or willful neglect in the performance of duty, extortion, conviction of intoxication, conviction of felony, or incompetency; and such veteran shall not be removed, transferred or suspended for any cause above enumerated from any office or employment, except after a full hearing before the governor of the state if a state employee, or before the prosecuting attorney if a county employee, or before the mayor of any city or the president of any village, or before the commission of any such city or village operating under a commission form of government, if an employee of a city or village, or before the township board if a township employee, and at such hearing the veteran shall have the right to be present and be represented by counsel and defend himself against such charges: Provided further, That as a condition precedent to the removal, transfer, or suspension of such veteran, he shall be entitled to a notice in writing stating the cause or causes of removal, transfer, or suspension at least 15 days prior to the hearing above provided for, and such removal, suspension or transfer shall be made only upon written order of the governor,

the prosecuting attorney, the mayor, commission, or the township board: Provided, however, That where such veteran has been removed, transferred, or suspended other than in accordance with the provisions of this act, he shall file a written protest with the officer whose duty under the provisions of this act it is to make the removal, transfer, or suspension, within 30 days from the day such veteran is removed, transferred, or suspended; otherwise the veteran shall be deemed to have waived the benefits and privileges of this act: Provided, however, Said hearing shall be held within 30 days of filing such notice: Provided further, That the mayor of any city or the president of any village or the commission of any such city or village operating under a commission form of government may refer any protest where a veteran is removed, transferred, suspended or discharged, to the legal department of such city or village for a hearing. The legal department shall act as a fact finding body and shall have the power to examine witnesses, administer oaths and do all those things which the mayor could do hereunder: Provided further, That the findings shall be transmitted to the mayor in writing by the legal department, whereupon the mayor shall examine the transcript of the hearing and make a decision based on the transcript thereof: And provided further, That where such veteran has been reinstated to his employment upon the written order of the governor of the state if a state employee, the prosecuting attorney if a county employee, the mayor of any city or the president of any village or the commission of any such city or village operating under a commission form of government, or a township board if a township employee, or by an order of any court of competent jurisdiction, then such veteran shall be entitled to receive compensation for the time lost from date of such dismissal or suspension to the date of reinstatement at the same rate of pay received by him at the date of dismissal or suspension.